IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERESA ROBINSON	:	CIVIL ACTION
	:	
v.	:	NO. 05-2902
	:	
COUNTY OF LANCASTER, CONESTOGA VIEW NURSING HOME et al.	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J. **December 28, 2005**

The Defendants, all involved in the operation of Lancaster County's Conestoga View Nursing Home, ask this Court to dismiss Teresa Robinson's claim that her termination after the death of a patient violated her civil rights. Because I find Robinson was an employee at will whose age was not a factor in her dismissal, I will grant the Defendants's motion to dismiss for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

FACTS[1]

Robinson worked at Conestoga View for fifteen years providing recreational programs for the residents. On July 22, 2004, Robinson planned a food social at which pieces of summer fruit were served. Several untrained, teenaged volunteers assisted Robinson at the food social. Two of the volunteers left the day-room to offer fruit to other residents at Conestoga View. Without

[1]I accept as true all allegations and reasonable inferences in the plaintiff's complaint, and view them in the light most favorable to the non-moving party. *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989).

supervision, the volunteers served fruit to a resident who choked on the fruit and died. As a result of this death, Robinson was fired. Robinson appealed her termination as part of the grievance procedure at Conestoga View. After an informal hearing, a panel upheld the decision to terminate Robinson.

Robinson alleges Lancaster County as owner of Conestoga View, Conestoga View, two supervisors and Complete Healthcare Resources, Inc., the operator of Conestoga View, violated her civil rights under 42 U.S.C. § 1983; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*; the Pennsylvania Human Relations Act (PHRA), 43 P.S. § 951 *et seq.*[2]; and, the Lancaster County Human Relations Act (LCHR). Additionally, Robinson complains all Defendants are liable for defamation and Healthcare Resources was negligent in its management and supervision of its employees. The Defendants argue the federal complaint should be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

DISCUSSION

A motion to dismiss for failure to state a claim should be granted if it appears the plaintiff can prove no set of facts in support of her claim. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957). The issue is not whether the plaintiff will prevail "but whether [she] is entitled to offer evidence to support the claims." *S. Camden Citizens in Action v. N. J. D.E.P*, 254 F. Supp. 2d 486, 493 (D. N.J. 2003) (citations omitted). A party seeking a 12(b)(6) dismissal may not rely on matters outside the pleadings, otherwise "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ." Fed. R. Civ. P. 12(c); *South Camden Citizens in Action*, 254 F. Supp. 2d

[2] 1955 P.L. 744, as amended 1961 P.L. 47.

at 493.

Robinson alleges the Defendants deprived her of her property, liberty and due process rights in violation of 42 U.S.C. § 1983. To establish a *prima facie* case under 42 U.S.C. § 1983, Robinson must allege and prove: (1) the "conduct complained of was committed by a person acting under color of state law;" and (2) the "conduct deprived [the plaintiff] of rights secured under the Constitution or federal law." *Sameric Corp. of De. v. City of Phila.*, 142 F.3d 582, 590 (3d Cir. 1998). Conestoga View was at the time Robinson was fired a county agency; thus, the Defendants acted under color of state law. The only question is whether Robinson was deprived of a constitutional or statutory right.

Robinson alleges that under the 14th Amendment she had a constitutionally protected property interest in her continued employment at Conestoga, an interest she claims Conestoga violated when she was terminated without a pre-termination hearing,[3] citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, the Court held that the Constitution requires a pre-termination hearing for an employee who has a constitutionally protected property interest in continued employment. *Id*. at 542. In that case, the plaintiff had a property right in his continued employment because an Ohio state law stated "classified civil servants"could only be terminated for cause. *Id.*.

In this case, Robinson must prove she had a constitutionally protected property interest in her continued employment by showing more than an "unsubstantiated expectation" of continued employment. *Carter v. Phila.*, 989 F.2d 117, 120 (3d Cir. 1993) (citations omitted). Robinson must

[3]A public employee with a protected property right is only protected by procedural due process, not substantive due process because employment rights are "state-created rights and are not 'fundamental' rights created by the Constitution.. . ." *Homar v. Gilbert*, 63 F. Supp. 2d 559, 574 (M.D. Pa. 1999) (citations omitted).

prove she has an "entitlement to a property interest created expressly by state statute or regulation or arising from government policy or a mutually explicit understanding between a government employer and an employee." *Id.* In Pennsylvania, a local government cannot provide its employees with an expectation of continued employment unless there is express enabling legislation. *Elmore v. Cleary*, 399 F.3d 279, 282 (3d Cir. 2005). Without express legislation, public employees in Pennsylvania are at-will employees subject to summary dismissal. *Scott v. Phila. Parking Auth.*, 166 A.3d 278, 280 (Pa. 1960).

Robinson has not plead any set of facts, or any Pennsylvania law, that would allow this court to believe she had any more than a "unsubstantiated expectation" of continued employment at Conestoga View. Because Robinson did not have a protected property interest in her continued employment, she was not entitled to a pre-termination hearing. Robinson cannot claim a 1983 violation for a right she did not have. *Loudermill* at 542.

Robinson also has alleged a violation of her liberty rights due to stigmatization of her reputation following her termination. Robinson claims the Defendants published false statements which destroyed her reputation and standing. There is no constitutionally protected liberty or property interest in reputation. *Puchalski v. School Dist. of Springfield*, 161 F. Supp. 2d 395, 406 (E.D. Pa. 2001); *see also Paul v. Davis*, 424 U.S. 693 (1976). Defamation in the course of dismissal from public employment, however, offends a liberty interest and demands procedural due process. *Puchalski*, 161 F. Supp. 2d at 406 (citations omitted).

The Third Circuit held to allege a violation of a liberty interest under 42 U.S.C. § 1983, a plaintiff must demonstrate a valid "stigma-plus" claim. *Boone v. Penn. Office of Vocational Rehab. et al.*, 373 F.3d 484, 497 (3d Cir. 2005). "Stigma" has been described as a governmental action that

infringes upon a person's good game or reputation, and the "plus" is generally a termination of employment. *Id* (citations omitted).

If the government's stigmatizing comments violate a liberty interest, the plaintiff is entitled to a hearing to clear her name. *Graham*, 402 F.3d 139, 144 (3d. Cir. 2005). The Supreme Court has held that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). If a plaintiff is "afforded . . . notice and the opportunity to respond to the allegations against [her]," her liberty rights were not violated. *Graham*, 402 F.3d at 144.

Accepting all allegations and inferences in a light most favorable to the non-moving party, this court concludes Robinson was provided with adequate notice and opportunity to be heard to overcome any liberty interest violation claim. In this case, Robinson was given an opportunity to appeal her termination through the established grievance procedures of Conestoga View. An informal hearing was held and her termination was upheld by the panel.

Robinson asserts an ADEA claim on grounds she was treated differently from the volunteers involved. The ADEA proscribes employers from failing to hire, discharging, or "otherwise discriminat[ing] against any individual . . . because of such individual's age," 29 U.S.C. § 623(l), so long as he or she is within the statutorily protected class of individuals who are at least 40 years of age. 29 U.S.C. § 631(a). To prevail in a disparate treatment action, Robinson "must prove by a preponderance of the evidence that age was a determinative factor in the employer's decision." *Billett v. Cigna Corp.*, 940 F.2d 812, 816 (3d Cir.1991) (citation omitted). Robinson must show she (1) is a member of the protected class, (2) was discharged from a job (3) for which she was qualified,

and (4) was replaced by or treated less favorably than another employee not in the protected class. *Maxfield v. Sinclair Int'l,* 766 F.2d 788, 793 (3d Cir.1985); *Massarsky v. General Motors Corp.,* 706 F.2d 111, 118 (3d Cir. 1983), *cert. denied,*464 U.S. 937 (1983). If Robinson fails to state "a prima facie case, the inference of discrimination never arises, and the employer's motion for summary judgment will be granted." *Dodge v. Susquehanna Univ.,* 785 F.Supp. 502, 505 (M.D. Pa. 1992) (quoting *Mesnick v. Gen. Elec. Co.,* 950 F.2d 816, 824 (1st Cir.1991)).

Robinson's ADEA claim does not survive the first step of the analysis. Robinson is a member of the protected class and was discharged from a job for which she was qualified. Robinson has not, however, alleged any fact by which this Court could conclude she was treated less favorably than another similarly-situated employee. Teenaged volunteers are not employees. Any disparity in treatment between Robinson and the teenagers is not a meaningful comparison under the ADEA.

Having granted summary judgment on all federal claims, this Court must now consider whether to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. 1367(c)(3) states that the court "may decline to exercise supplemental jurisdiction [over state law claims] if . . . the district court has dismissed all claims over which it has original jurisdiction." The remaining state claims for state and county human rights violations, defamation, and negligent supervision do not involve federal policy issues. Neither party will be prejudiced by returning to state court as the federal claims were disposed of prior to trial on the merits. 28 U.S.C.A. § 1367 (c)(3). I decline to exercise supplemental jurisdiction and will dismiss the remaining counts without prejudice to refiling the state claims (Counts III-VI) in state court. 28 U.S.C. § 1367(d); *Jinks v. Richland County, S.C.*, 538 U.S. 456, 463 (2003)(holding the tolling statute at 28 U.S.C. § 1367(d) constitutional). See also *Imperiale v. Hahnemann University,* 776 F.Supp. 189, 200 (E.D. Pa. 1991),

aff'd,966 F.2d 125 (3d Cir.1992); 42 Pa.C.S. § 5103(b). An appropriate order follows.

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ORDER

AND NOW, this 28th day of December, 2005, Defendants's Motions to Dismiss Pursuant to Rule 12(b)(6) are GRANTED on all federal claims (Documents 3 and 6). The remaining state law claims are dismissed without prejudice to refile in state court in accordance with the transfer provisions in 42 Pa.C.S. § 5103(b). 28 U.S.C. § 1367(D).

BY THE COURT:

\s\ Juan R.Sánchez
Juan R. Sánchez, J.